(9)

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 627

In the Matter of

PITTSBURGH TERMINAL COAL CORPORATION,
Debtor.

ALEXANDER GUTTMANN, Individually and as Chairman of the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMANN, IRENE GUTTMANN, RUDOLPH GUTTMANN, MONROE GUTTMANN and ELIZABETH WOLFERS,

Petitioners,

against

PITTSBURGH TERMINAL COAL CORPORATION, Debtor; WILLIAM G. HEINER, as Trustee of Pittsburgh Terminal Coal Corporation, Debtor; UNION TRUST COMPANY OF PITTSBURGH, Successor Trustee for Bondholders of Pittsburgh Terminal Coal Corporation; THE PITTSBURGH AND WEST VIRGINIA RAILWAY COMPANY; and NORTH AMERICAN COAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

HARRY HOFFMAN,
ALLEN H. BERKMAN,
SAMUEL MARION,
NATHAN D. LEIMAN,
Counsel for Petitioners.

INDEX

CASES CITED

STATUTES CITED

TEXTS

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PITTSBURGH TERMINAL COAL CORPORATION,
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against *Petitioners,*

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ALEXANDER GUTTMANN, individually and as Chairman of the Protective Committee for the Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S.

GUTTMANN, IRENE GUTTMANN, RUDOLPH GUTTMANN, MONROE GUTTMANN and ELIZABETH WOLFERS respectfully pray for the issuance of a writ of certiorari to review a decision of the Circuit Court of Appeals for the Third Circuit (hereinafter sometimes referred to as the Court Below) made in the above entitled cause on October 13, 1942 (R. p. 81 ; 130 F. [2d] 872). The said decision of the Circuit Court of Appeals affirmed a decision by the United States District Court for the Western District of Pennsylvania (hereinafter sometimes referred to as the District Court) made March 13, 1942, unreported (78a), which upheld a decision of a Referee in Bankruptcy disallowing certain proofs of claim filed by Petitioners (53a; 64a; 66a; 69a).

Copies of said decisions are hereto attached.

A

Summary Statement of the Matter Involved

On or about December 4, 1924, a contract of merger and consolidation was entered into by and between the Debtor and Meadow Lands Coal Company, pursuant to the terms of which the present Pittsburgh Terminal Coal Corporation was formed. The said agreement provided, among other things, as follows (39a):

> "5. A sinking fund for the protection and gradual retirement of the preferred stock shall be created by the deposit, within thirty days following the termination of each quarter of the calendar year, with a bank or trust company to be designated from time to time by the Board of Directors, (said bank or trust company being hereinafter referred to as the 'Trustee'), of a sum equivalent to 7¢ for each ton of coal mined and removed during the preceding quarterly period from the properties owned by Pittsburgh Terminal Coal Company before its consolidation with Meadow Lands Coal Company. Said sinking fund so created may be invested in the purchase of said preferred stock at a

> price not exceeding par in such manner as the Trustee may deem advisable. If unable to purchase said preferred stock at or below par said fund may be invested by the Trustee, upon instruction from the Board of Directors, in either high grade securities or additional coal lands."

Land Title and Trust Company of Philadelphia, Pa., was designated as Trustee of the sinking fund above referred to (40a).

The Debtor issued certificates of Preferred Stock and offered the same for sale to the public.

Claimants are the owners and holders of $609,400 par value of such certificates. All said certificates of Preferred Stock, including also the certificates of Preferred Stock owned by Petitioners, were all endorsed with the language above quoted.

The annual report of the Debtor as of December 31, 1938 shows that there was outstanding on that day $3,323,700 par value of 6% Cumulative Preferred Stock.

The Debtor failed to make some of the promised payments into the sinking fund (40a).

On April 19, 1939 Receivers were appointed for the Debtor. On December 4, 1939 a petition for reorganization under Chapter X of the Chandler Act was filed and was approved on January 2, 1940 (1a).

Petitioners, being the holders of Preferred Stock of the Debtor, which Preferred Stock provided for a sinking fund as hereinbefore set forth, filed proofs of claim and amended proofs of claim as creditors (1) for the amount of the full par value thereof, plus accrued dividends, and (2) for satisfaction of the sinking fund provisions hereinbefore referred to (36a; 38a; 47a).

The amended proofs of claim allege that as of December 31, 1938 the arrears in payments into the sinking fund for the Preferred Stock amounted to $1,290,501.88 and that as of May 31, 1941 the said arrears totaled $1,418,438.59 (40a). The Referee below (item 4 of his Opinion, 56a) quoted an

amended proof of claim as stating that as of December 31, 1937, the arrears to the sinking fund amounted to $1,216,088.52 (36a).

Said amended proofs of claim also contained, among others, the following averments (36a):

> "12. That at the time of the payments under the said sinking fund agreement the Debtor was fully solvent, and the payments due under said sinking fund agreement could have been made without prejudice to any of the creditors of the debtor corporation; and that such payments would not have reduced the remaining assets of the corporation below an amount sufficient to pay all debts and all liabilities of the corporation as they matured, except such debts and liabilities as have been otherwise and adequately provided for."

These averments were not denied, the case being heard by the Referee as if upon demurrer and upon the objection that the same were insufficient in law (47a; 49a; 51a; 52a; Opinion of Referee, 57a; 63a). The briefs of respondents below expressly admit that (for the purposes of these proceedings at least) the Debtor could have made the payments into the sinking fund at the time they were due without becoming insolvent and without prejudice to the existing rights of creditors and stockholders.

Said claims were disallowed by the Referee (53a; 64a; 66a; 69a) who also denied a trial upon the issue of solvency (63a). Upon petition for review, the District Court, by an order of Hon. R. M. Gibson filed March 13, 1942, dismissed the Petitioners' objections to the Referee's Report and confirmed and sustained the said Report (78a; 79a).

An appeal from the order of the District Court was taken to the Court Below. In a decision of October 13, 1942 the order of the District Court was affirmed.

The Questions Presented

1. Are the Preferred Stockholders, by virtue of the above quoted provisions contained in the Merger Certificate and endorsed upon the Preferred Stock Certificates themselves, creditors of the Debtor?

If they are creditors, are they creditors either (a) for the amount which should have been paid into the sinking fund up to the date of the filing of the petition for reorganization, or (b) in such amount as would represent 7¢ per ton of coal mined up to the date of the filing of the petition *plus* either (i) 7¢ per ton for each ton of coal mined subsequent to the date of the filing of the petition, or (ii) such an amount as would equal 7¢ per ton upon all the unmined coal at the date of the filing of the petition,—but in no event in excess of the par value or principal amount of their Preferred Stock plus accumulated dividends or interest?

2. Are or were the Preferred Stockholders secured or preferred for such claims either (a) by way of equitable lien or otherwise upon the coal lands, or (b) upon the coal lands and the proceeds thereof in the hands of the Trustee of the Debtor, or (c) both?

3. In the posture of the case before the Referee, the District Court and the Court Below, the solvency of the Debtor and its failure to make the payments into the sinking fund without prejudice to its creditors being undisputed, could the sinking fund provisions have been enforced by the Preferred Stockholders and can they now be so enforced?

4. Were Petitioners entitled to a trial upon the issue of solvency?

5. Does the intervention of the petition for reorganization destroy such rights which had previously accrued? And were Petitioners unconstitutionally deprived of their property by the Courts Below?

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347(a). The mandate of the Circuit Court of Appeals was entered November 12, 1942.

Statutes Involved

(a) The pertinent provision of the Pennsylvania Business Corporation Law, which was enacted in 1933, is §705 and reads as follows:

> "No redemption of shares shall be made which shall reduce the remaining assets of a corporation below an amount sufficient to pay all debts and known liabilities of the corporation as they mature, except such debts and liabilities as have been otherwise adequately provided for."
>
> Pennsylvania Business Corporation Law, Act of 1933, P. L. 364, Art. VII, Sec. 705; 15 P. S. Sec. 2852-705.

(b) The pertinent provisions of §63 of the Bankruptcy Act read in part as follows:

> "Debts which may be proved
>
> "Sec. 63a.—Debts of the bankrupt may be proved and allowed against his estate which are founded upon
>
> "(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;
>
> "(9) Claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property;"
>
> National Bankruptcy Act, Sec. 63(a), 11 U. S. C. A. Sec. 106(a) (4).

(c) The pertinent portion of the provision of §126 of the Chandler Act provides:

> "§126. * * * three or more creditors who have claims against a corporation or its property amounting in the aggregate to $5,000. or over, liquidated as to amount and not contingent as to liability, * * * may, * * * file a petition under this Chapter."

Constitutional Provisions Involved

(a) The pertinent portion of the Fifth Amendment to the United States Constitution, 2 U. S. Const. Anno. p. 517, provides:

> "No person * * * shall be deprived of * * * property, without due process of law * * * ."

(b) The Pennsylvania Constitution, Article I, Sec. 9, provides:

> "Sec. 9. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

(c) The Pennsylvania Constitution, Article I, Sec. 17, provides:

> "Sec. 17. EX POST FACTO LAWS, IMPAIRMENT OF CONTRACTS. No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

B

Reasons Relied Upon for the Allowance of the Writ

The reasons for the granting of a Writ of Certiorari herein are as follows:

1. The Court Below has decided an important question of local law in a way in direct conflict with the applicable local decisions. *Warren* v. *Queen & Co.*, 240 Pa. 154, 87 Atl. 595 (1913); *Peoples Pittsburgh Trust Co.* v. *Pittsburgh United Corp.*, 338 Pa. 328, 12 Atl. (2) 430 (1940).

2. The Court Below has decided an important question of Federal law which has not been but should be settled by this Court, and has decided it in a way probably in conflict with the applicable decisions of this Court. *Warren* v. *King*, 108 U. S. 389 (1883).

3. The Court Below has so far departed from the accepted and usual course of judicial procedure and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision, in that both Courts relied upon the decision in *In re Pittsburgh Terminal Coal Corporation*, 30 Fed. Supp. 106, 109 Fed. (2) 1020, as applicable and controlling, whereas, in fact, said decision is neither applicable nor controlling.

4. The questions presented involve important questions in bankruptcy, and also involve the constitutional rights of Petitioners.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled "In the Matter of Pittsburgh Terminal Coal Corporation, Debtor. Alexander Guttmann, Individually, and as Chairman of the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, Howard S. Guttmann, Irene Guttmann, Rudolph Guttmann, Monroe Guttmann and Elizabeth Wolfers, Appellants, No. 7999", and that said final order and decree of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your Petitioners may have such other, further and different relief in the premises as to this Honorable Court may seem just.

New York, N. Y., December 29, 1942.

ALEXANDER GUTTMANN, Individually and as Chairman of the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMANN, IRÉNE GUTTMANN, RUDOLPH GUTTMANN, MONROE GUTTMANN and ELIZABETH WOLFERS,
By HARRY HOFFMAN,
Their Counsel.

Of Counsel:
ALLEN H. BERKMAN,
SAMUEL MARION,
NATHAN D. LEIMAN.

Referee's Opinion on Claim of Howard S. Guttmann

Filed by Referee September 11, 1941.

1. Howard S. Guttmann filed a proof of claim (Number 262 in this proceeding) on November 18, 1940, an amended proof of claim on July 18, 1941 and another amended proof of claim August 5, 1941. As stated in an order of the Referee filed August 5, 1941, the last amended proof of claim was filed in the place and stead of the original proof of claim and the averment in the last amended proof of claim "that the instruments upon which the debt or liability is founded are attached hereto" refers to certificates attached to the first proof of claim.

2. The claim is for $19,740. The proof of claim alleges that the consideration of the debt is moneys loaned to the debtor on its written obligations in the nature of certificates of indebtedness. The certificates are attached to the original claim. Each certificate on its face shows the name of the debtor, certifies that White, Weld & Co. is the owner of a named number of shares of the fully paid and non-assessable preferred capital stock of "this Company" of the par value of $100 each, that a "statement of the preferences, voting powers, restrictions and other provisions governing the six per cent cumulative preferred stock and the common stock of the Company, all of which are fully set forth in the Agreement of Merger and Consolidation (a copy of which is on file at the office of the Transfer Agent) appears on the reverse side" thereof and that the holder "by accepting this certificate, assents to, and becomes bound by, all the provisions therein set forth." On the reverse side of each certificate is endorsed an assignment from White, Weld & Co. to Howard S. Guttmann of "Shares of the Capital Stock represented by the within Certificate". There also appear on the reverse side of each certificate paragraphs, which provide, inter alia, that the

holders of the preferred stock shall be entitled to receive, as and when determined and declared by the Board of Directors, dividends at the rate of six per cent per annum, that said dividends shall be cumulative, that in the event of any liquidation or dissolution of the corporation, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full, both the par amount of their stock and the dividends accumulated and unpaid thereon, before any amount shall be paid to the holders of the common stock; and a paragraph 5 which reads as follows: "5. A sinking fund for the protection and gradual retirement of the preferred stock shall be created by the deposit, within thirty days following the termination of each quarter of the calendar year, with a bank or trust company to be designated from time to time by the Board of Directors, (said bank or trust company being hereinafter referred to as the 'Trustee'), of a sum equivalent to 7¢ for each ton of coal mined and removed during the preceding quarterly period from the properties owned by Pittsburgh Terminal Coal Company before its consolidation with Meadow Lands Coal Company. Said sinking fund so created may be invested in the purchase of said preferred stock at a price not exceeding par in such a manner as the Trustee may deem advisable. If unable to purchase said preferred stock at or below par said fund may be invested by the Trustee, upon instruction from the Board of Directors, in either high grade securities or additional coal lands."

3. The claimant calculates his claim at the par value of what he calls his certificates of indebtedness, of which he says he holds 120 (there being attached to his proof of claim three certificates calling for an aggregate of 120 shares of stock), which is $100 each, together with accrued back dividends amounting, according to the original claim, to $64.50 each, or a total of $164.50 per certificate, or $19,740 in all. The amended proof claims the same total

but states the back dividend to be $70.50 per certificate, which would make an aggregate of $20,460.

4. The claimant, without limiting his claim, also sets forth the provisions of paragraph 5 above quoted, alleges that the debtor admitted that the sinking fund provided for in that paragraph was in arrears as of December 31, 1937 in the amount of $1,216,088.52, and claimant claims "as a beneficiary of the trust, a preference for the violation of trust funds to the extent of $39.97 per certificate of indebtedness," which on the basis of 120 "certificates" aggregates $4796.40.

5. The amended proof of claim also avers that an action had been commenced prior to the commencement of this proceeding by and on behalf of the preferred stockholders against the debtor and its directors involving among other things the question of the sinking fund provisions endorsed upon the preferred stock which constituted one of the bases for claimant's claim. By stipulation filed August 12, 1941 it appears that the action to which reference is made is civil action Number 845 filed in this court by Rita Crepeau and Irene Guttmann, suing on behalf of Pittsburgh Terminal Coal Corporation, for themselves and for the benefit of all other stockholders of Pittsburgh Terminal Coal Corporation, who may come in and contribute to the costs of this action, complainants, against Pittsburgh Terminal Coal Corporation and more than thirty other defendants. The complaint in that proceeding refers to the provisions of the above quoted paragraph 5 and alleges that the defendants failed to set aside the sum of seven cents per ton on the coal referred to, but contains no prayer for the payment thereof to anybody and merely prays that the defendants account for certain moneys and make payment to Pittsburgh Terminal Coal Corporation. The amended proof of claim also alleged "That at the time of the payments under the said sinking fund agreement the Debtor was fully solvent, and the payments due under said sinking

fund agreement could have been made without prejudice to any of the creditors of the debtor corporation; and that such payments would not have reduced the remaining assets of the corporation below an amount sufficient to pay all debts and all liabilities of the corporation as they matured, except such debts and liabilities as have been otherwise and adequately provided for."

6. Objections to the allowance of the original claim were filed by William G. Heiner, Trustee of the debtor, Robert Beck and North American Coal Corporation, respectively. The order of the referee dated August 5, 1941, which permitted the last amendment to be filed, gave leave to the parties who theretofore filed objections to amend their objections either by controverting or avoiding the new averments of fact contained in said amended proof or by disputing their materiality in law without admitting or denying their verity in fact, without prejudice, in the event such new averments of fact be finally adjudged to be material in law, to the right to file within ten days after such final adjudication further amendments controverting or avoiding such new averments of fact. Separate objections to the amended proof of claim were filed by William G. Heiner, Trustee, and North American Coal Corporation denying the materiality of the new averments of fact without admitting or denying the verity of such new averments. By leave of court granted August 12, 1941 and August 14, 1941 the Pittsburgh & West Virginia Railway Company and The Union Trust Company of Pittsburgh, successor trustee under the mortgage indenture of the debtor, also separately filed objections to the amended proof of claim without admitting or denying the truth of the new averments of fact. The objections to the amended claim reserved the right in the event that the new averments of fact are finally adjudged to be material in law to file further objections controverting or avoiding them. The several objections in substance aver that the claimant is a stockholder and not a creditor, that he is not entitled

to participate in any distribution of the assets of the debtor until all the debts of the debtor have been paid in full, that the certificates upon which the claim is based constitute the claimant a holder of preferred stock and are not certificates of indebtedness and do not evidence a loan, that there is no contract or obligation whereby the debtor undertook to retire or purchase claimant's stock from any moneys deposited or required to be deposited into said sinking fund, or to distribute pro rata to the claimant any moneys deposited or required to be deposited therein, and that there are no trust funds in existence upon which any trust could be impressed for the benefit of the claimant. It is also alleged that a substantial proportion of the claim is barred by the statute of limitations.

DISCUSSION.

1. The underlying question in controversy is whether the claimant has the status of a creditor or has nothing more than the status of a stockholder. The proof of claim, as amended, (a) asserts the loan of money on so-called certificates of indebtedness, (b) asserts a claim for the par value of the "certificates" plus unpaid dividends, and (c) asserts, alternatively, a claim for a proportionate share in a so-called trust fund, being the sinking fund promised by the certificates.

2. The instruments upon which the claim is based clearly purport to be certificates of stock ownership and not certificates of indebtedness, and the rights given to claimant by these instruments are given to him merely as a stockholder. If authority for this conclusion be required reference may be made to Warren v. Queen & Co., 240 Pa. 154. The allegations in the proofs of claim that the instruments are certificates of indebtedness and that the consideration of the claim is moneys loaned, are mere expressions of claimant's conclusions rather than averments of fact. There

is no showing of any contract or agreement other than that embodied in the certificate, wherein this case differs from Browne v. St. Paul Plow Works, 64 N. W. 66, 64 Minn. 90, and In re Lehrenkrauss Corp., 10 Fed. Supp. 14, cited by claimant. Counsel for claimants in their briefs are silent as to the contention that the claim is based on a loan or on certificates of indebtedness and it appears to have been abandoned.

3. The holder of stock, whether common or preferred, is not a creditor of a corporation but a part owner of its property: Moy v. Colonial Finance Corp., 283 Pa. 223. "Preferred stockholders are members of the corporation, not its creditors. 'Formerly it was a matter of doubt and discussion whether or not a preferred stockholder had any rights as a creditor of the company or was confined to his rights as a stockholder. The law is now clearly settled that a preferred stockholder is not a corporate creditor': Cook on Corporations, 8th ed., vol. 1, p. 910, sec. 271:" Mitchell, Rec. of Liberty Clay Products Company, 291 Pa. 282. A corporation cannot lawfully use its funds to retire preferred stock if creditors would be prejudiced thereby: Warren v. Queen & Co., 240 Pa. 154; Culver v. Reno Real Estate Co., 91 Pa. 367.

4. The claim is primarily for the par value of the stock plus cumulative dividends. By the provisions of paragraph 3 on the reverse side of the stock certificates the stockholder, in the event of any liquidation or dissolution of the corporation, is entitled to the par amount of his stock and the dividends unpaid thereon before any amount shall be paid to the holders of common stock. These provisions manifestly deal with distribution to stockholders by virtue of their being part owners of the corporation's property and do not create a debtor-creditor relationship.

5. The claimant relies chiefly upon his secondary claim, which is based on the sinking fund provision in paragraph 5 appearing on the reverse side of the certificates. That paragraph requires the making of deposits for a sinking fund in the hands of a trustee and authorizes the investment thereof in the purchase of debtor's preferred stock at a price not exceeding par in such manner as the trustee might deem advisable, or if such stock be not obtainable at such a price, directs investment of the fund in securities or coal lands upon instruction from the Board of Directors. If the sinking fund payments were now required to be made the fund would not suffice to pay as much as par value for all the preferred stock. The proof of claim contains no offer to sell or part with claimant's stock for less than par. For that reason, if no other, the claim, in so far as it is for a pro rata share of the amount which ought to be in the sinking fund, could not be allowed.

6. The provisions of paragraph 5 of the stock certificate are wholly consistent with the theory that the preferred stockholders' rights are rights of ownership. The required sinking fund payments are measured by the amount of coal mined, that is, represent a capital asset which has been liquidated in the course of the corporation's operations, and paragraph 5 provides for the application of such assets so as to prevent their distribution as profits. It may be that but for the pendency of the present proceeding the preferred stockholders could bring some sort of action to enforce the provisions of paragraph 5, and if the debtor corporation has assets in excess of what is required to satisfy all its debts, such action might result in a judgment or decree against the corporation for the payment of money to a trustee to be used for the purposes prescribed in paragraph 5. Such a judgment or decree would have the semblance of a debt but it would be merely a device for segregating a part of the corporation's property for the benefit of the corporation's owners. The right to sue for such a segregation does not constitute claimant a creditor.

7. No action to enforce the sinking fund provisions was brought before the commencement of the present proceedings. The civil action, Number 845 in this court, was not such an action.

8. The claim to preference for the violation of trust funds is not tenable because, if for no other reason, the sinking fund was only promised, it was never in existence.

9. Chapter X of the Bankruptcy Act, under which this proceeding is pending, clearly differentiates between stockholders and creditors in Section 106 where it says (emphasis here supplied):

> "For the purposes of this chapter, unless inconsistent with the context—
>
> (1) 'claims' shall include all claims of whatever character against a debtor or its property, *except stock*, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent; * * *
>
> (4) 'creditor' shall mean the holder of any claim; * * *
>
> (12) 'stock' shall include membership, shares, and similar interests in a debtor, certificates and other evidences of such membership, shares or interests, and voting-trust certificates;".

It thus appears that while the definition of "claims" is very broad it expressly excepts stock. The reference to section 63, upon which claimant somewhat relies, is subject to the same exception.

10. It is clear that the present claimant has not shown himself to be a creditor within the meaning of Chapter X of the Bankruptcy Act. This conclusion may well be rested upon the ruling of Judge Gibson, affirmed on appeal, to

the effect that holders of preferred stock of the present debtor are not *ipso facto* creditors: In re Pittsburgh Terminal Coal Corp., 30 F. Supp. 108, 109 F. (2d) 1020. The opinion in that case does not expressly refer to the contention, now made, based upon the sinking fund provision, a contention which would have been useless in the former proceeding because under section 126 of the Act a creditor is not eligible to be a petitioning creditor unless his claim is liquidated as to amount and not contingent as to liability. This new contention is not sufficient to distinguish this case from the one ruled by Judge Gibson.

CONCLUSION.

It is concluded that the claim must be disallowed as a proof of debt, and that it is unnecessary to determine the disputed question of debtor's ability to provide a sinking fund without prejudice to creditors or the effect, if any, of the statute of limitations.

WATSON B. ADAIR,
Referee in Bankruptcy.

September 11, 1941.

Referee's Opinion on Claims of Irene Guttmann, Rudolph Guttmann, Monroe Guttmann, Elizabeth Wolfers and Constituents of Alexander Guttmann, Chairman of the Protective Committee for Preferred Stockholders and Attorney in Fact for Certain Holders of Preferred Stock

Filed by Referee September 11, 1941.

On November 18, 1940, Irene Guttmann, Rudolph Guttmann, Monroe Guttmann and Elizabeth Wolfers filed proofs of claim numbered, respectively, 263, 264, 265 and 267, and some 43 persons collectively, by their attorney in fact Alexander Guttmann, Chairman of the Protective Committee for Preferred Stockholders, filed a joint proof of claim, numbered 266. Amendments to each of these claims were filed July 18, 1941 and August 5, 1941. The July 18, 1941 amendment of the claim made by Alexander Guttmann as attorney in fact, omitted the names of some of his constituents named in the original claim and included the names of Howard S. Guttmann, Irene Guttmann, Rudolph Guttmann, Monroe Guttmann and Elizabeth Wolfers, who filed claims for themselves, but the last amendment filed by him named as claimants the original constituents and no others. Objections to the allowance of the original claims were filed by William G. Heiner, Trustee of the debtor, Robert Beck and North American Coal Corporation, and objections to the claims as last amended were filed by William G. Heiner, Trustee, North American Coal Corporation, The Union Trust Company of Pittsburgh, successor trustee under a mortgage indenture, and the Pittsburgh & West Virginia Railway Company. The last amended proofs of claim filed by Irene Guttmann and by the joint claimants represented by Alexander Guttmann, attorney in fact, followed closely the pattern of the last amended proof of claim filed by Howard S. Guttmann respecting which an opinion was filed today. The proofs of claim of Rudolph

Guttmann, Monroe Guttmann and Elizabeth Wolfers have a somewhat different pattern but they, as well as the others, are like the proof of claim of Howard S. Guttmann in that they are all based on like certificates of the same class of preferred stock in the debtor corporation and include the claims for the par value of the stock plus accumulated dividends and for a share of the sinking fund contemplated by paragraph 5 of the provisions on the backs of the stock certificates. The last amended proofs of claim show some changes in amounts claimed, but the changes appear unimportant in view of the conclusion hereinafter stated.

The reasoning of the opinion respecting the claim of Howard S. Guttmann and the conclusions therein reached apply equally to the claims of Irene Guttmann, Rudolph Guttmann, Monroe Guttmann, Elizabeth Wolfers and the joint claimants represented by Alexander Guttmann, all of which proofs of claim will therefore be disallowed.

WATSON B. ADAIR,
Referee in Bankruptcy.

September 11, 1941.

Memorandum and Order of District Court

Filed March 13, 1942.

MEMORANDUM.

GIBSON, District Judge.

Howard S. Guttmann, Irene Guttmann, Rudolph Guttman, Monroe Guttmann, Elizabeth Wolfers and Alexander Guttmann, in his own right and as Chairman of a Committee of Preferred Stockholders, have caused to be certified for review orders of the Referee wherein he refused to allow the claims of such persons as creditors of the Debtor. The subject matter of the review is fully set forth in his opinion filed upon the claim of Howard S. Guttmann. All others joining in the request for review are substantially of the same status as Howard S. Guttmann.

The Referee's opinion fully reflects the views of the court, which therefore adopts it, and will enter an order sustaining its rejection of the claims of above named persons who have sought review.

ORDER.

And now, to wit, March 13, 1942, the orders of the Referee, dated September 12, 1941, wherein said Referee denied the claims filed respectively by Howard S. Guttmann, Irene Guttmann, Rudolph Guttmann, Monroe Guttmann, Elizabeth Wolfers and Alexander Guttmann, in his own right and as Chairman of a Protective Committee for Preferred Stockholders and attorney-in-fact for 43 Preferred Stockholders, having come on to be heard upon Review, upon consideration thereof, it is ordered, adjudged and decreed that exceptions and objections to each of said orders be, and the same are, dismissed, and that each of said orders be, and the same hereby is, confirmed and sustained.

R. M. GIBSON,
District Judge.

Opinion of the Circuit Court of Appeals

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 7999. October Term, 1942.

In the Matter of

PITTSBURGH TERMINAL COAL CORPORATION, Debtor.

ALEXANDER GUTTMANN, Individually and as Chairman of the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMANN, IRENE GUTTMANN, RUDOLPH GUTTMANN, MONROE GUTTMANN and ELIZABETH WOLFERS, Appellants.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Before MARIS and JONES, *Circuit Judges,* and AVIS, *District Judge.*

PER CURIAM.

The questions raised upon this appeal were ruled by this court in a prior appeal in this cause, In the Matter of Pittsburgh Terminal Coal Corporation, Debtor; Rita Crepeau et al., Appellants, 109 F. 2d 1020, affirming a prior order of the district court, 30 F. Supp. 106. Upon the authority of that case the order of the district court now appealed from is affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No.

In the Matter of

PITTSBURGH TERMINAL COAL CORPORATION,
Debtor.

ALEXANDER GUTTMANN, Individually and as Chairman of the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMANN, IRENE GUTTMANN, RUDOLPH GUTTMANN, MONROE GUTTMANN and ELIZABETH WOLFERS,

Petitioners,

against

PITTSBURGH TERMINAL COAL CORPORATION, Debtor; WILLIAM G. HEINER, as Trustee of Pittsburgh Terminal Coal Corporation, Debtor; UNION TRUST COMPANY OF PITTSBURGH, Successor Trustee for Bondholders of Pittsburgh Terminal Coal Corporation; THE PITTSBURGH AND WEST VIRGINIA RAILWAY COMPANY; and NORTH AMERICAN COAL CORPORATION,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions Below

The opinions of Honorable Watson B. Adair, Referee in Bankruptcy (53a, 64a), both dated September 11, 1941,

are not reported. The opinion of the District Court, Gibson, J., filed March 13, 1942 (78a), is not reported. The opinion of the Circuit Court of Appeals filed October 13, 1942, is reported in 130 F. (2d) 872. Copies of all said opinions are annexed to the Petition.

II

Jurisdiction

1. The statutory provision believed to sustain the jurisdiction of this Court is referred to under Heading A, page 6 of the Petition.

2. The case presents no issue of fact, since all facts alleged in Petitioners' proofs of claim are admitted by Respondents' denial of the insufficiency thereof in law. The sole issues are as to the construction of the Pennsylvania Corporation Law and the relevant provisions of the Chandler Act.

III

Statement of the Case

A full statement of the case has been made under Heading A, page 2 of the Petition.

IV

Specification of Errors

1. The Court erred in not holding that Petitioners were entitled to prove as creditors to the extent of 7¢ per ton of coal mined up to the date of the filing of the Petition for reorganization herein, and in addition either (a) 7¢ per ton for each ton of coal mined or mineable subsequent

to the date of the filing of the Petition, or (b) such an amount as would equal 7¢ per ton upon all the unmined coal at the date of the filing of the Petition—but in no event in excess of the par value or principal amount of their Preferred Stock plus accumulated dividends or interest.

2. The Court erred in not holding that Petitioners were secured by way of equitable lien or otherwise upon the coal lands, and in not holding that the coal lands, and in addition (a) 7¢ per ton of coal mined or mineable therefrom subsequent to the filing of the Petition herein, or (b) 7¢ per ton with respect to each ton of coal susceptible of being mined on the date of the Petition for reorganization, constituted a trust fund in the hands of the Trustee of the Debtor for the benefit of the Preferred Stockholders.

3. The Court erred in not holding that Petitioners were entitled to a trial upon the question of whether or not the Debtor could have made the sinking fund payments without prejudice to its creditors and stockholders, and as to whether or not the remaining assets of the Debtor were more than sufficient to pay all debts and known liabilities at the times when payments into the sinking fund were due.

V

Summary of the Argument

POINT A

The sinking fund provisions upon the Preferred Stock Certificates gave rise to a claim against the Debtor for 7¢ per ~~pound~~ ton of coal mined; failure by the Debtor to make that payment gave rise to a right of action, of which petitioners could not be deprived by the intervening petition for reorganization.

POINT B

Claimants are entitled to prove as secured and preferred creditors.

POINT C

The claims are provable in this proceeding, at least to the extent to which they existed on the date of the filing and approval of the petition, and also, in addition either (a) 7¢ per ton with respect to the number of tons in the ground on the date of the filing, or (b) with respect to 7¢ per ton for each ton subsequently mined.

The decision of the Court below unconstitutionally deprived claimants of their property without due process of law and without compensation.

POINT D

The decision in *In re Pittsburgh Terminal Coal Corporation*, 30 Fed. Supp. 106, 109 Fed. (2d) 1020, is neither applicable nor controlling and the Court below erred in relying thereon.

VI

ARGUMENT

POINT A

The sinking fund provisions upon the Preferred Stock Certificates gave rise to a claim against the Debtor for 7¢ per ~~pound~~ ton of coal mined: failure by the Debtor to make that payment gave rise to a right of action, of which petitioners could not be deprived by the intervening petition for reorganization.

Although it is a general rule that a preferred stockholder is merely a part owner of the corporation in which he holds stock, and is not a creditor of the corporation by virtue of that naked fact, situations may and do arise (as at bar) where such holder achieves a creditor status in addition to or in part substitution for the stockholder status.

Some classic illustrations, somewhat comparable to the case at bar, where a stockholder may achieve a creditor status, are as follows:

1. Where a corporation declares dividends on its stock, the holder of the stock certificate becomes a creditor to the extent of the dividend declared even though the creditor relationship springs from his previous relation as a stockholder, and in such a case (even in insolvency) the stockholder becomes a creditor in the amount of the dividend in addition to his status as stockholder. *Gerdes on Corporate Reorganizations,* Vol. 2, §636 and cases there cited; *Bryan* v. *Welch,* 74 Fed. (2d) 964 (C. C. A. 10th, 1935); *In re Interborough Consol. Corp.,* 267 Fed. 914 (D. C, S. D. N. Y., 1920); *Sinclair Cuba Oil Co. S. A.* v. *Manati Sugar Co., et al.,* 2 Fed. Supp. 240 (D. C., S. D. N. Y., 1932); *Steel Cities Chemical Co.* v. *Virginia-Carolina Chemical Company,* 7 Fed. (2d) 280 (C. C. A. 2nd, 1925).

2. Where a corporation makes a promise to redeem its preferred stock and subsequently fails to execute that promise at the appointed time. This substantially is the case at bar. In such a case, the promise to redeem gives rise to an enforcible claim by the holder of the preferred stock in a capacity as creditor. *Richards* v. *Wiener*, 207 N. Y. 59, 100 N. E. 592 (1912); *Peoples-Pittsburgh Trust Co.* v. *Pittsburgh United Corp.*, 338 Pa. 328, 12 Atl. (2d) 430 (1940; reargument dismissed, 1940); *Browne* v. *St. Paul Plow Works*, 62 Minn. 90, 64 N. W. 66 (1895), at p. 67.

The case at bar must be differentiated from those cases in which dividends are payable out of surplus earnings only or in which the redemption date comes at a time when the corporation was insolvent. Dividends are subject to two contingencies—(a) declaration by the Board of Directors, and (b) the existence of a surplus at the time of declaration. At bar, the payment into the sinking fund was not dependent upon any declaration by the Debtor, but was automatic under the terms of the Merger Agreement. Payments into the sinking fund were also to be made irrespective of the existence of any surplus, and were susceptible of being fixed and determined upon each quarterly date in accordance with the number of tons of coal mined. The obligation (of the corporation to pay into the sinking fund) is therefore analogous to that which arises upon a declared dividend or to a redemption at a time when the corporation is solvent.

At bar, the preferred stockholders become creditors in substitution for their stock position, to the extent of the payments provided to be made into the sinking fund; and if the payments provided to be made into the sinking fund would not discharge par and dividends, they become creditors to the extent of such provided payments, and remain stockholders for the balance.

Therefore, such cases as *In re Piccadilly Realty Co.*, 78 Fed. (2d) 257 (C. C. A. 7th, 1935) (where payments were expressly to be made out of surplus profits and where there were neither surplus nor profits out of which payments

might be made), and *In re Arcadia Furniture* Co., 12 Fed. Supp. 477 (D. C., W. D. Mich., S. D., 1935) (where the same situation existed), have no application.

Nor do cases like *Spencer* v. *Smith,* 201 Fed. 647 (C. C. A. 8th, 1912) (where the *redemption date* did not arrive until *subsequent* to the bankruptcy), or the construction which respondents place upon *Warren* v. *King,* 108 U. S. 389 (1883) (where the preferred stock was to be payable "after its* indebtedness"), have any application to the facts at bar.

The correct approach, in the construction of the Pennsylvania statute involved, was taken by the Supreme Court of Pennsylvania in *Peoples-Pittsburgh Trust Co.* v. *Pittsburgh United Corp., supra.* There a trust agreement was made providing for redemption of preferred stock whereby the corporation's assets on the redemption date were to be applied by the trustee first to the payment of all claims accrued prior to such time, and then to the payment of the preferred stock, with the balance to be returned to the corporation. Because of the decrease in the value of the corporation's assets after the redemption date, no assets were available to pay subsequent creditors on the date of actual redemption, although on the agreed redemption debt a large balance over the amount required to retire the preferred stock was available to the corporation. Creditors objected to the redemption.

The Court posed the question (p. 433):

> "Would performance of the agreement on March 1st (the redemption date) have left the corporation solvent?"

It then answers the same question as follows (p. 433):

> "If it would, and there is no doubt of that fact, there was no breach of the statute and appellants can take nothing by their appeals."

In the case at bar it is admitted (for the purposes of this record at least) that the payments into the sinking fund

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* The corporation's.

would have left the Corporation solvent on the sinking fund dates, and Petitioners' claims should have been allowed.

See, also, *Warren* v. *Queen,* 240 Pa. 154, 87 Atl. 595 (1913). In that case the converse of the situation at bar was presented. The affidavit of defendant stated that there were no funds or property with which to redeem the shares of stock without injustice to the existing creditors and other stockholders.

The Court held that if these facts were "sustained on the trial of the cause" they would prevent a recovery, clearly indicating that if solvency is admitted the payments could and should have been made, and further clearly indicating that the claimants were entitled to a trial upon the issue of solvency.

Upon any such trial of the issue of solvency, the burden of proving insolvency is upon the Debtor. *Warren* v. *Queen, supra; Richards* v. *Wiener, supra.*

In this connection, it is especially to be noted that, contrary to the assumptions which have been indulged in by respondents below, there is no allegation or proof of insolvency in the record. The mere filing of a petition under the Chandler Act does not denote insolvency. In fact, the Petition herein is founded upon inability of the Debtor to pay its debts rather than upon insolvency, so that upon that state of the record (coupled with the fact that the allegations of solvency in the proofs of claim are admitted by the pleadings herein) the Debtor Corporation stands before this Court as fully solvent at the times the payments into the sinking fund were due—and, in fact, also, even at the present time. Thus the Debtor was not and is not legally debarred from discharging its obligation to the Preferred Stockholders under the sinking fund provisions, both those which arose before the filing of the Petition for Reorganization, as well as those which arose thereafter.

In *101 A. L. R. 154,* et seq., there is a note discussing in general the validity and enforcibility of agreements by a corporation to repurchase its own stock. At page 158, it is mentioned that such repurchase may be accomplished if the

corporation is not insolvent on the purchase date, citing many cases, including the following Pennsylvania cases:

Wolf v. *Excelsior Automatic Scale & Supply Co.*, 270 Pa. 547, 113 A. 569 (1921);

Smith v. *Citizens Ins. & Mortgage Co.*, 284 Pa. 380, 131 Atl. 191 (1925).

See further 1 *Thompson on Corporations*, 2d Ed., Sec. 321, page 356—Interpretation and Amendment of Charters—citing *The Binghamton Bridge Co.*, 3 Wall. 51, 70 U. S. 51 (1865); see, also, *Fletcher, Cyc. Corp.*, Vol. II, §5291 and cases cited.

It is, therefore, apparent that the Court below decided an important question of Pennsylvania law in direct conflict with the applicable local decisions.

POINT B

Claimants are entitled to prove as secured and preferred creditors.

The agreement with the Preferred Stockholders dealt with and related to specific property, viz., a tract of land and the coal to be mined therefrom and the payment to be made with respect thereto. An agreement to pay out of such fund is valid and enforcible. 3 *Pomeroy's Equity Juris.*, 4th Ed., pp. 2961-2965; *Pomeroy*, p. 2976, Sec. 1238.

See also:

Union Trust Company v. *Bulkeley*, 150 Fed. 510 (C. C. A. 6th, 1907), (where a parol assignment was held to create a valid lien against the assignor's trustee in bankruptcy);

Corney v. *Saltzman*, 22 Fed. (2d) 268 (C. C. A. 2nd, 1927) (where an equitable lien arising from an agreement was held to make a mortgage enforcible even against a trustee in bankruptcy, if the lien arises out of an agreement which confines security to a specific *res* and purports to give an absolute present right);

Voltz v. *Treadway,* 59 Fed. (2d) 643 (C. C. A. 6th, 1932) (where a parol assignment of a bankrupt of funds to be collected in the future, was held to create an equitable lien thereon, valid as against the trustee in bankruptcy, though the funds were collected after adjudication).

POINT C

The claims are provable in this proceeding, at least to the extent to which they existed on the date of the filing and approval of the petition, and also, in addition either (a) 7¢ per ton with respect to the number of tons in the ground on the date of the filing, or (b) with respect to 7¢ per ton for each ton subsequently mined.

The decision of the Court below unconstitutionally deprived claimants of their property without due process of law and without compensation.

The claims at bar are susceptible of liquidation and may be proved under Section 63 of the Bankruptcy Law.

Thus in *Maynard* v. *Elliott,* 283 U. S. 273, 51 Sup. Ct. 390 (1931), this Court said at page 275:

> "* * * it is now settled that claims founded upon a contract, which at the time of bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section,* although not absolutely owing when the petition is filed."

See further *In re Simon,* 197 Fed. 105 (D. C. W. D. N. Y., 1912); *Board of County Commissioners* v. *Hurley,* 169 Fed. 92 (C. C. A. 8th, 1909).

In *Central Trust Co. of Illinois* v. *Chicago Auditorium Association,* 240 U. S. 581, 36 Sup. Ct. 412 (1916), this Court had for construction a contract whereby the Association had granted the right to transfer and carry baggage and passengers. The Trustee in Bankruptcy did not assume performance of the contract.

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* Referring to the Bankruptcy Act, Section 63.

This Court held (p. 589) that the promisor has a right to maintain an action at once for the damage occasioned by such anticipatory breach.

In other words, the claims of claimants herein as creditors became crystallized as of the time when the payment should have been made into the sinking fund and their right of action to further payments became crystallized on the date of the filing of the Petition for Reorganization. Their contract rights must then be determined as to those respective dates. The mere filing of the Petition could not wipe out rights which had already sprung into existence.

The Referee below impliedly agrees that but for the reorganization proceedings Petitioners would be entitled to prove their claims, for he says (61a):

> "It may be that but for the pendency of the present proceeding the preferred stockholders could bring some sort of proceeding to enforce the provisions of paragraph 5."

If this be so, how could they be altogether deprived of the value of their claims?

The bankruptcy statute could measure the final allocation upon the claim, measured by the assets available therefor or pledged therefor; it could not, and did not, extinguish the claim itself.

Fifth Amendment, *U. S. Constitution,* 2 U. S. Const. Anno., p. 517;

Article 1, Sec. 9, *Pa. Constitution,* P. S. Const., p. 38;

Article 1, Sec. 17, *Pa. Constitution,* P. S. Const., p. 39;

Louisville Joint Stock Land Bank v. *Radford,* 295 U. S. 555, 55 Sup. Ct. 854 (1935);

Central Trust Company of Illinois v. *Chicago Auditorium Association,* 240 U. S. 581, 36 Sup. Ct. 412 (1916);

City Bank Farmers Trust Co. v. *Irving Trust Co.,* 299 U. S. 433, 57 Sup. Ct. 292 (1937);

Yoakam v. *Providence Biltimore Hotel Co.,* 34 Fed. (2d) 533 (D. C. D. R. I. 1929);
In re Jordan, 2 Fed. 319 (D. C. D. Me. 1880).

The deprivation by the Court below of Claimants' crystallized rights was unconstitutional and deprived Claimants of their property without due process of law and without compensation.

The Court below has therefore decided a question of Federal law which has not yet been, but should be, settled by this Court, and in a way probably in conflict with the applicable decisions of this Court.

POINT D

The decision in *In re Pittsburgh Terminal Coal Corporation*, 30 Fed. Supp. 106, 109 Fed. (2d) 1020, is neither applicable nor controlling and the Court below erred in relying thereon.

In *In re Pittsburgh Terminal Coal Corporation, supra,* Preferred Stockholders of the Debtor filed a petition for reorganization under the Chandler Act. The Petition itself was founded upon the claims of the Preferred Stockholders, *qua* stockholders, on the ground that the instrument itself, instead of being a certificate for preferred stock, was in fact a certificate of indebtedness. See transcript of the Record on said appeal (C. C. A. 3d, No. 7273, October Term, 1939).

The District Court, dismissing the Petition, stated that the "sole basis of the claim of each petitioner arose from his status as a stockholder. As such he is plainly precluded from being a participant in the filing of an involuntary petition against the alleged debtor corporation" (p. 107).

The Referee in the case at bar (62a, 63a) expressly states that the opinion in 30 Fed. Supp. 106 (cited by the Referee as 30 Fed. Supp. 108) "does not expressly refer to the contention, now made, based upon the sinking fund provision, a contention" says the Referee "which would have been useless in the former proceeding because under Section 126 of the Act a creditor is not eligible to be a *petitioning creditor* unless his claim is liquidated as to amount and not contingent as to liability" (italics ours).

The decision in the former case merely went to the extent of holding that the petitioners in that case, as stockholders, were not "petitioning creditors" within the definition of the Chandler Act. Their status as creditors under the sinking fund provision was not raised by the Petition and was not before the Court, which is the question here involved.

The opinion in the former case did not go to the extent, and it was quite apparently not intended to go to that extent, of holding that the Preferred Stockholders were not and could not be creditors at all. The Court there decided the issues as presented to it, and the Petitioners having presented the issue as to whether the certificate of preferred stock was in fact a certificate of indebtedness, as distinguished from a preferred stock certificate, the Court made its decision upon that set of facts.

The Court did not decide, and there was not presented to the Court by the Petition, the question as to whether or not the sinking fund provisions quoted at pages 2-3 of the Petition for Certiorari in fact gave a creditor status to the Preferred Stockholders.

The determination in the previous case was based upon the ground that the claims had not yet been liquidated as to amount, and that, therefore, the Petitioners for reorganization in that case did not qualify as "petitioning creditors" within the definition of §126 of the Chandler Act.

Judge Gibson himself, in the opinion in that case (30 Fed. Supp. at 107) apparently expressly rests his dismissal of the Petition upon that ground, for he says:

> "The original and supplemental petitions, failing as they do to disclose *petitioners authorized to sign them,* must be dismissed." (Italics ours.)

In using the words "authorized to sign", Judge Gibson was not referring to the legal authority of those Petitioners to sign that Petition, but was actually referring to their legal capacity to sign as *"petitioning creditors"* under §126 of the Chandler Act.

There is a distinction between *"creditors"* whose claims may be proven in bankruptcy and *"petitioning creditors"* authorized to file a petition for reorganization. A determination in the previous case that the Petitioners there were not authorized to sign the Petition because their claims had not been liquidated as to amount is not and cannot be applicable or controlling in this case, which is a proceeding for the very purpose of liquidating the amounts of the claims.

The decision in *In re Pittsburgh Terminal Coal Corporation,* 30 Fed. Supp. 106, 109 Fed. (2d) 1020, is, therefore, neither applicable to nor controlling upon the situation at bar, and if it be held to be applicable we submit that it is erroneous and the reasoning thereof should be overruled by this Court.

CONCLUSION

It is respectfully submitted that this case presents in a clean-cut manner (a) an importation question of Pennsylvania law decided by the Court below in direct conflict with the applicable local decisions; and (b) an important question of Federal law which has not been but should be settled by this Court, and which has been decided by the Court below in a way probably in conflict wtih the applicable decisions of this Court; and that this Court should review the decision of the Circuit Court of Appeals for the Third Circuit and finally reverse it.

It is, therefore, respectfully submitted that a Writ of Certiorari be issued out of this Honorable Court to the Circuit Court of Appeals for the Third Circuit.

Dated, New York, December 29, 1942.

Respectfully submitted,

HARRY HOFFMAN,
ALLEN H. BERKMAN,
SAMUEL MARION,
NATHAN D. LEIMAN,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

NO. 627.

In the Matter of
PITTSBURGH TERMINAL COAL CORPORATION,
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ALEXANDER GUTTMANN, Individually and as Chairman of the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMANN, IRENE GUTTMANN, RUDOLPH GUTTMANN, MONROE GUTTMANN and ELIZABETH WOLFERS,

Petitioners,

v.

PITTSBURGH TERMINAL COAL CORPORATION, Debtor; WILLIAM G. HEINER, as Trustee of Pittsburgh Terminal Coal Corporation, Debtor; THE UNION TRUST COMPANY OF PITTSBURGH, Successor Trustee for Bondholders of Pittsburgh Terminal Coal Corporation; THE PITTSBURGH AND WEST VIRGINIA RAILWAY COMPANY; and NORTH AMERICAN COAL CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

SUBJECT INDEX.

TABLE OF CITATIONS.

Cases.

Statutes.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

COUNTER-STATEMENT OF THE CASE.

Petitioners complain of the affirmance by the Circuit Court of Appeals for the Third Circuit (R. 82) of an order entered by the United States District Court for the Western District of Pennsylvania (R. 79) dismissing exceptions to and confirming the orders of the Hon-

orable Watson B. Adair, Referee in Bankrupcty, filed September 12, 1941, disallowing the petitioners' claims as creditors of the Pittsburgh Terminal Coal Corporation, without prejudice to their rights to prove interests as stockholders (R. 66-69).

On December 4, 1939, a petition was duly filed in the District Court under Chapter X of the Bankruptcy Act for the reorganization of the Pittsburgh Terminal Coal Corporation, hereinafter commonly referred to as the Debtor (R. 1). On January 2, 1940, the District Court approved the petition as properly filed and appointed trustees for the Debtor (R. 1). This proceeding, designated in the District Court as No. 20,716 in Bankruptcy (R. 1), is still continuing and it was in this proceeding that the claims of the preferred stockholders in question were filed.

The Debtor has outstanding bonds in the principal amount of $2,564,000 (first report of Heiner, Trustee, p. 2)[1]. These bonds are secured by a first mortgage on real estate of the Debtor, and The Union Trust Company of Pittsburgh has succeeded as trustee for the bondholders under said mortgage indenture (first report of Heiner, Trustee, p. 2). The Debtor also has outstanding 31,285 shares of preferred stock and 119,000 shares of common stock (first report of Heiner, Trustee, p. 1). The Debtor lost money in every year beginning with 1927 (first report of Heiner, Trustee, p. 4). The Debtor's balance sheet as of November 30, 1940, showed a capital deficit of $2,475,293.04 (R. 27). "From an examination of the balance sheet and the foregoing comments on assets and liabilities, it is readily apparent

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1. This report, which is dated January 29, 1941, is included in the certified record on appeal, being item 32 in the petitioners' Designation of Contents of Record on Appeal.

that the debtor is heavily insolvent" (first report of Heiner, Trustee, p. 11).[2]

On October 3, 1940, the District Court ordered, *inter alia,* that "All proofs of claim, except proofs of claim founded on bonds and proofs of interest founded upon shares of stock, shall be filed on or before November 18, 1940, and objections to such claims shall be filed with the Referee on or before December 3, 1940."[3] The same order provided that the Referee should allow or disallow all contested claims. No date has yet been fixed for the filing of proofs as stockholders and such interests can still be proved.

On November 18, 1940, proofs of claim were filed by the petitioners, which were amended on July 18, 1941, and again on August 5, 1941 (R. 53). The original claims, as well as the amendments thereof, are all substantially alike (R. 65). All of the claims are based on instruments which are distinctly labeled preferred stock certificates (R. 34, 44, 54). The claims recite that a copy of one of the instruments on which the claims are based is attached to them (R. 34), but since no copy of said instruments has been printed in or attached to the record

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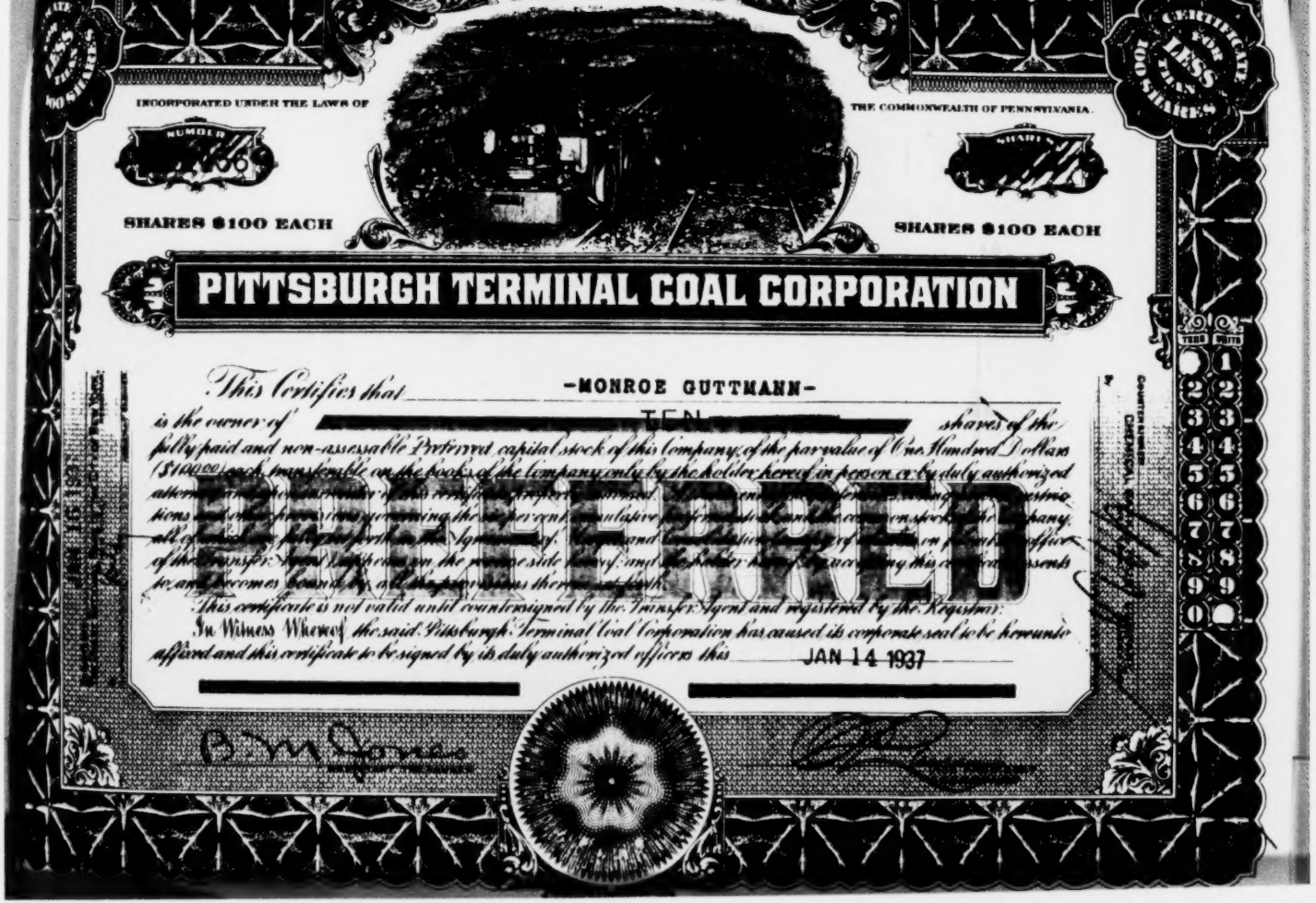
2. In the second report of Heiner, Trustee, included in the Record on Appeal through this respondent's Counter-designation of the Contents of the Record, it is stated (p. 2) that mining operations by the Debtor have completely ceased; the conclusion of Messrs. Sanderson & Porter, engineers who made a thorough study of the Debtor, is quoted (p. 3) that no reorganization of the Debtor on a profitable basis is possible; and the Trustee expressed himself as follows (p. 3): "It appears, consequently, that no reorganization of the Debtor's assets on a going concern basis (mining operations) can be effected at this time and that the immediate function of this proceeding is to provide the means for the orderly liquidation of the assets and their appropriate distribution among the creditors and stockholders."

3. Said order of October 3, 1940, is item 10 in petitioners' Designation of Contents of Record on Appeal.

printed by petitioners, we are inserting at this point a photostatic copy of one of those instruments, being Certificate N.Y.O. 4436, issued to Monroe Guttmann, one of the claimants, and referred to in his amended proof of claim (R. 45). The instruments are all the same, except for the serial number, amount of shares and name of the person to whom issued (R. 34). Said instruments being in writing will speak for themselves and will be found to have all the earmarks and distinguishing characteristics of shares of preferred capital stock, and none of those of certificates of indebtedness or bonds. The claims assert that the instruments on which they are based are certificates of indebtedness and allege that the Debtor is indebted to the claimants in the amount of the par value of the preferred stock held by each of them, respectively, plus the accumulated dividends thereon (amounting together to $170.50 a share), a preference for which is claimed to the extent of $39.97 a share (R. 33, 35). The Debtor promised to deposit 7¢ for each ton of coal mined into a sinking fund for the retirement of the preferred stock (see paragraph 5 of the endorsements on the preferred stock certificate), and the amount of the preference claimed is apparently calculated by dividing the number of preferred shares into the amount which would have been in the sinking fund if it had been maintained in accordance with the aforesaid provision (R. 35-36). In fact the last payment into the sinking fund was made in March, 1928, and no sinking fund whatsoever for preferred stock now exists (R. 21-23, 62 and see first report of Heiner, Trustee, p. 2). No dividends on the preferred stock have been declared or paid since March 1, 1927 (first report of Heiner, Trustee, p. 2).

Objections to the claims on the ground that the claimants were preferred stockholders and not creditors


INCORPORATED UNDER THE LAWS OF
THE COMMONWEALTH OF PENNSYLVANIA
NUMBER
SHARES
SHARES $100 EACH
SHARES $100 EACH
PITTSBURGH TERMINAL COAL CORPORATION
This Certifies that -MONROE GUTTMANN-
is the owner of TEN shares of the
fully paid and non-assessable Preferred capital stock of this Company, of the par value of One Hundred Dollars
($100.00) each, transferable on the books of the Company only by the holder hereof in person or by duly authorized
CANCELLED
This certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.
In Witness Whereof the said Pittsburgh Terminal Coal Corporation has caused its corporate seal to be hereunto
affixed and this certificate to be signed by its duly authorized officers this JAN 14 1937

STATEMENT OF THE PREFERENCES, VOTING POWERS, RESTRICTIONS AND OTHER PROVISIONS GOVERNING THE SIX PER CENT. CUMULATIVE PREFERRED STOCK, AND THE COMMON STOCK.

1. The holders of the preferred stock of this company shall be entitled to receive, as and when determined and declared by the Board of Directors, dividends at the rate of 6% per annum, and no more, payable quarterly on the first day of each of the months of March, June, September and December of each year, for the quarter immediately preceding, from the surplus or net profits of the corporation. The said dividends shall be cumulative; and no dividends shall be paid or set apart for the common stock in any calendar year, unless and until full dividends at the rate of 6% per annum for such calendar year shall have been declared and paid on the preferred stock, or provided for by a fund set apart for the payment thereof, nor unless and until full dividends shall have been paid on the preferred stock for all previous years, or portions thereof.

2. When full cumulative dividends on the preferred stock at the rate of 6% per annum shall have been declared for the current year and shall have been paid or provided for as aforesaid, the Board of Directors may, in its discretion, declare dividends on the common stock of the corporation at such rate as may, from time to time, be determined by said Board of Directors, payable then or thereafter, out of any remaining surplus or net profits of the corporation.

3. In the event of any liquidation or dissolution of the corporation, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full, both the par amount of their stock and the dividends accumulated and unpaid thereon, before any amount shall be paid to the holders of the common stock, but shall not be entitled to share further in the assets of the corporation or the proceeds of liquidation. After the payment to the holders of the preferred stock of its par value, and the unpaid accrued dividends thereon, the remaining assets and funds of the corporation shall be distributed and paid to the holders of the common stock according to their respective rights.

4. The holders of the preferred stock shall not be entitled to receive any dividends or share of the profits beyond the 6% aforesaid, whether payable in cash, stock or property; nor shall they have any preemptive right to subscribe for any new issue of stock of any class, now or hereafter authorized or issued; and the corporation reserves the right, without any notice to, or consent of, the then holders of any of the preferred stock of this corporation, to increase or alter in any way the amount and character of the common stock which it may be authorized to issue. Additional preferred stock of equal or superior standing with that then outstanding shall not be issued except upon the affirmative vote of the holders of at least two-thirds in amount of the outstanding preferred stock and of at least two-thirds in amount of the outstanding common stock, registered at an annual meeting of the stockholders, or at a special meeting of the stockholders called in compliance with the provisions of the By-Laws relating thereto, and of which meeting notice is given to the holders of the preferred stock, similar to that given to the holders of the common stock. In no other respect may the rights or terms of the preferred stock be altered or affected except upon favorable vote of a majority of the preferred stock.

5. A sinking fund for the protection and gradual retirement of the preferred stock shall be created by the deposit, within thirty days following the termination of each quarter of the calendar year, with a bank or trust company to be designated from time to time by the Board of Directors, (said bank or trust company being hereinafter referred to as the "Trustee"), of a sum equivalent to 7¢ for each ton of coal mined and removed during the preceding quarterly period from the properties owned by Pittsburgh Terminal Coal Company before its consolidation with Meadow Lands Coal Company. Said sinking fund so created may be invested in the purchase of said preferred stock at a price not exceeding par in such a manner as the Trustee may deem advisable. If unable to purchase said preferred stock at or below par said fund may be invested by the Trustee, upon instruction from the Board of Directors, in either high grade securities or additional coal lands.

6. Except in the case of the proposed creation and issue of additional preferred stock of equal or superior standing to that already outstanding or of the proposed alteration of the rights or terms of the outstanding preferred stock, the holders of preferred stock shall have no voting powers whatsoever, nor shall they be entitled to notice of any meeting of the stockholders of the corporation, unless and until the corporation shall be in default in the payment of any quarterly dividend on the preferred stock and such default shall have continued for the period of one year. In such case, and thereafter, the holders of the preferred stock shall have the right to receive notice of all meetings of stockholders, and at any such meeting the preferred stock shall, for any and all purposes, have full voting rights; that is to say, the holders of preferred stock shall be entitled to as many votes as they hold shares of such stock upon all questions coming before any meeting of stockholders; and such full voting rights shall continue in the preferred stock until all unpaid accumulated dividends thereon shall have been paid; whereupon, unless and until the corporation shall again be in default as hereinbefore described, the preferred stock shall again be excluded from the right to receive notices of meetings or to vote for any purpose whatsoever. Should any default continue for over two years, then the preferred stock voting as a class shall be entitled to elect one-half the Board of Directors.

7. The preferred stock as an entirety shall be subject to redemption and may be redeemed at the option of the corporation at any time from the date of issue thereof, on any quarterly dividend payment date, by payment, for each share of stock so to be redeemed, of 105% of the par value thereof, and, in addition thereto, of all dividends accumulated and unpaid thereon. Notice of the redemption under this provision shall be given by written notice mailed, not less than sixty (60) days prior to the date fixed for redemption, to the last known address of each record holder of the preferred stock, and by notice published in a newspaper of general circulation in the City of Pittsburgh, Pennsylvania, and in a like newspaper in the City of New York, New York, once a week for six (6) successive weeks prior to said redemption date, the first publication to be not less than sixty (60) days prior to said redemption date.

8. No notes or bonds secured by a mortgage on the real estate of the company may be issued in excess of the amount of presently existing obligations, except for the acquisition of new property, and then only in an amount not in excess of seventy-five per cent. (75%) of the value of the property so acquired, unless, in addition to the vote or consent required of the common stock, if any, at least two-thirds of the outstanding preferred stock shall vote in favor thereof, or consent thereto; provided, however, that the above provision shall not be construed to limit or abridge the right of the corporation, without such consent or vote, to execute purchase-money mortgages or create other purchase-money liens.

For Value Received hereby sell, assign and transfer unto Norma Guttmann

_____ Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint _____ Attorney to transfer the said stock on the Books of the within named Company, with full power of substitution in the premises. Dated JAN 15 1937

In Presence of

J. Kelley

Norma Guttmann

L. J. Longuemare

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE IN EVERY PARTICULAR WITHOUT ALTERATION OR ENLARGEMENT, OR ANY CHANGE WHATEVER.

THIS SPACE MUST NOT BE COVERED IN ANY WAY

were duly filed by William G. Heiner, Trustee for the Debtor (R. 17, 48), and by various other interested parties, including this respondent, the indenture trustee for the bondholders (R. 11, 30, 47, 51, 52).

After having been twice postponed at the request of the claimants, a hearing to determine the validity of their claims was held before the learned Referee on June 16, 1941. At that hearing the claimants offered in evidence the merger agreement between the Debtor and the Meadow Lands Coal Company, which adds nothing to the case, because all of the provisions contained in said merger agreement applicable to the preferred stock are printed verbatim on the back of the preferred stock certificates (see recital to that effect on face of preferred stock certificate). No other evidence was offered by claimants. At the conclusion of the hearing counsel for the claimants stated that they were not prepared then to argue the law applicable to the case, and accordingly it was agreed that the legal contentions and any other arguments of the parties should be submitted to the Referee in briefs. After briefs had been submitted the claimants on August 5, 1941, again amended their claims as stated above.

An opinion regarding the claims in question and covering all of the questions presented to him was filed by the learned Referee on September 11, 1941 (R. 53-65). In accordance with said opinion orders were entered by the Referee disallowing the claims "without prejudice to the claimants' rights to prove interests as stockholders" (R. 66-69). The claimants petitioned the District Court to review said orders of the Referee (R. 70). After hearing argument and considering briefs, the District Court sustained the decision of the Referee (R. 78-79). The Circuit Court of Appeals affirmed (R. 81-82).

SUMMARY OF ARGUMENT.

In a proceeding under Chapter X of the Bankruptcy Act preferred stockholders may not prove claims as creditors for the par value of their preferred stock plus the accumulated dividends thereon.

ARGUMENT.

I.

Question Decided in Prior Appeal.

The court below, we submit, was correct in holding that the question raised in this appeal was ruled in the prior appeal of substantially the same appellants in *In the Matter of Pittsburgh Terminal Coal Corporation, Debtor,* 109 F. (2d) 1020. That question is whether the holders of preferred stock of the Debtor are creditors of it or stockholders in it. The decision reached in the prior appeal, as expressed in the opinion of the District Court, which was adopted by the Circuit Court of Appeals, was as follows (30 F. Supp. 106 at 107):

> "In the view of the Act, as opposed to general creditors, he [each preferred shareholder] is an owner and as such subordinated to their claims."

In both appeals the real question was or is whether the preferred stockholders are creditors of the Debtor. The fact that the question arises in a different way in each appeal does not affect the answer to the question. If the answer to the question was correct then it remains so now. Then the question arose because three holders of preferred stock of the Debtor filed a petition for the reorganization of the Debtor under Chapter X of the Bankruptcy Act. Such a petition may only be filed by creditors and the question, therefore, was distinctly

raised in the prior appeal whether the preferred stockholders were creditors of the Debtor. Now substantially the same preferred stockholders are seeking to prove "debts" against the Debtor and that the Debtor "is justly and truly indebted to said creditors", meaning the petitioners, for the par value and accumulated dividends of their preferred stock (R. 33-35). The petitioners are, therefore, now expressly taking the position of creditors of the Debtor, which if successful would mean that they would share equally with the bondholders and other acknowledged creditors of the Debtor, except as the preferred stockholders claim a preference to the extent of the amount which would have been in the sinking fund for them if the sinking fund provisions had been maintained. In both instances the claims of the preferred stockholders were founded upon their certificates of preferred stock. Those certificates determine the rights of the petitioners. All of the provisions for the sinking fund and redemption of the preferred stock were before the Court on the prior appeal, because they are all printed on the preferred stock certificates, which were presented as the basis of the claim then as now. Indeed, in their brief (p. 10) in the Circuit Court of Appeals in the prior appeal (No. 7273 in the Circuit Court of Appeals) the appellants quoted the sinking fund provision for the retirement of the preferred stock from the merger agreement between the Debtor and Meadow Lands Coal Company; quoted (p. 18) the whole of paragraph 5 of the endorsements on the preferred stock certificates; and based their argument that they were creditors upon said sinking fund provisions (pp. 10 *et seq.*). In their brief (p. 10) in the prior appeal appellants argued "that by Debtor's violation of the integrity of a contracted sinking fund, the appellants have become creditors", which seems irreconcilable to us with the statement in their brief in support of their petition for *certiorari* (p. 35) that "Their status as creditors

under the sinking fund provision . . . was not before the Court" in the prior appeal. If, as correctly held before, the claimants were not creditors of the Debtor then, they are not now either.

It does not make any difference in the status of the claims whether the Debtor was solvent or insolvent when all or some of the sinking fund payments should have been, but were not, made. It would still be true in either event that the rights of the claimants are defined, and must be determined, by the written instruments on which they are expressly based. Those instruments unmistakably brand the status of the claimants as that of preferred stockholders and not creditors, and the law is well settled as shown by the cases cited in this brief that stockholders, preferred or common, are part owners of the enterprise and may not legally be repaid their capital or undeclared dividends until all creditors have been paid in full. As reference to the photostatic copy of one of the instruments in question which is bound in this brief[4] will show, the instrument certifies that a named person is the owner of a specified number of "shares of the fully paid and non-assessable Preferred capital stock of this Company"; recites that a statement of the preferences, "voting powers", restrictions and other provisions concerning "the six per cent. cumulative preferred stock, and the common stock" appears on the reverse side of the certificate; stipulates that "the holder hereof, by accepting this certificate, assents to and becomes bound by all the provisions therein set forth", which provisions are those printed on the back of the certificate; has in each upper corner on the face thereof "Certificate for less than 100 shares"; has a space entitled "Shares" where the number represented by the certificate is inserted; has printed in large type across the front of it

4. Between pages 4 and 5.

the word "PREFFERED"; has endorsed thereon the usual power of attorney for transferring stock, including the following "For value received .....hereby sell, assign and transfer unto ..... Shares of the Capital Stock represented by the within Certificate and do hereby . . . appoint ..... Attorney to transfer the said stock . . ."; and also has endorsed thereon a full statement of the preferences, voting powers, restrictions and other provisions governing the "preferred stock" and the common stock of the company, which include voting power in the preferred stockholders if their dividends are defaulted and the following: "The holders of the preferred stock of this company shall be entitled to receive, as and when determined and declared by the Board of Directors, dividends at the rate of 6% per annum, and no more, payable quarterly on the first day of each of the months of March, June, September and December of each year for the quarter immediately preceding, from the surplus or net profits of the corporation." All of the above provisions of the instruments in question are manifestly those of stock certificates, and are wholly inconsistent with the instruments being bonds or certificates of indebtedness. The instruments have none of the characteristics of bonds or certificates of indebtedness: they are not designated thereon as either; they do not contain a promise to pay the bearer or a registered owner a definite sum of money on any fixed or determinable date (even the provision for a sinking fund endorsed on the instruments does not specify any time when or within which the preferred stock will be redeemed; the sinking fund is to be used to retire preferred stock when it can be purchased at or below par, or to be invested in other securities "or additional coal lands"); they have no coupons attached to them or provide in any other way for the payment of interest. That the Debtor knew how to issue a bond creating the status of debtor and creditor is apparent

from the fact that the Debtor issued a large bond issue in 1902, of which over $2,500,000 are still outstanding. The former decision that petitioners are merely stockholders and not creditors of the Debtor was, therefore, correct and remains so.

The sinking fund provisions of the preferred stock are valid and enforceable, like the provisions giving preference to dividends on the preferred stock and to its repayment in case of liquidation, as between the preferred and common stockholders, but not against creditors of the corporation. What the preferred stockholders are trying to do now is to assume the status of creditors and thereby have the comparatively small assets of this now undoubtedly insolvent[5] Debtor distributed equally in this proceeding under the Bankruptcy Act *pro rata* among the creditors and the preferred stockholders. Such attempt is contrary to the prior ruling that a holder of the preferred stock of this Debtor "is an owner and as such subordinated to their claims"—meaning by the latter the claims of general creditors.

Even though the Debtor was solvent when the payments into the sinking fund for the preferred stock should have been made, and even though such payments into the sinking fund could then have been made without prejudice to the creditors of the Debtor, upon which allegations of their claims as last amended the petitioners heavily rely, the facts remain (1) that the written instruments which are the fountainhead of their claims establish that the petitioners are stockholders and not creditors and (2) that the petitioners are now seeking to participate at least equally in the assets of the Debtor with its creditors, which is contrary to law. Even if a sinking fund for the preferred stockholders

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5. See *ante*, pp. 2-3.

existed, which it does not (R. 62), the law would compel that fund to be used to pay off creditors of the corporation before any of it could be paid to stockholders in return of their capital or in payment of accumulated but undeclared dividends. A case in which the security specified and unmistakably earmarked for preferred stockholders actually existed, but in which it was nevertheless held that such fund must be used to pay creditors before any of it could be used to retire preferred stock, is *Ellsworth v. Lyons,* 181 Fed. 55 (C. C. A. 6, 1910). That was a proceeding by preferred stockholders to have appropriated for the retirement of their stock the proceeds of a life insurance policy which the corporation, when solvent, had taken out for the express purpose of securing and retiring the preferred stock. The corporation's by-laws expressly provided that the preferred stock should be retired on a specified date, on which date also the policy matured as an endowment. The by-laws further provided that the money received from the insurance policy "shall be used for no other purpose whatsoever than the retirement of the preferred stock." Notwithstanding said clearly expressed intent, the courts held that said insurance proceeds must be used to pay the claims of the corporation's creditors and that the preferred stockholders had no right to receive any part of said insurance money—and this notwithstanding that the claims of the creditors had arisen subsequent to the issuance of said preferred stock and the taking out of said insurance policy. The following are extracts from the opinion (p. 58):

> "It is equally well settled that a contract between a corporation and a stockholder by which the latter is to receive the par value or any part of his stock before all corporate debts are paid is contrary to public policy, and void." (Citing cases)

(p. 61):

"It is true that the agreement in question attempted to secure the preferred stockholders, but that, as shown by the authorities cited, is incompetent as against creditors prior or subsequent, and is the vice of the situation."

Ellsworth v. Lyons, supra, has been cited approvingly by the Supreme Court of Pennsylvania in *Moy v. Colonial Finance Corp.,* 283 Pa. 323, 326, 129 A. 115, and *Mitchell, Receiver of Liberty Clay Products Co.,* 291 Pa. 282, 290, 139 A. 853.

If preferred stockholders cannot enforce a trust upon a fund which actually exists and which was raised for the specific purpose of retiring the preferred stock, *a fortiori* they cannot have a trust declared in a non-existent fund of the amount that the corporation had agreed with the preferred stockholders it would pay into a sinking fund for their security, and it is wholly immaterial as between the preferred stockholders and creditors of the corporation that the corporation promised the preferred stockholders to create a sinking fund for them or whether the corporation was solvent at the times when the payments should have been deposited in the sinking fund if the promise had been kept.

The terms of the preferred stock issue of the Debtor remain as when they were previously before the Court below and there is no additional circumstance shown by the present record which takes the case out of the former decision of that Court that the claimants are not creditors of the Debtor.

II.

Bankruptcy Act Definition.

The Bankruptcy Act, § 106, Chapter X, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 883 (11 USCA § 506) defines a "creditor" as "the holder of any claim" and a claim as "all claims of whatever character against a debtor or its property, except stock . . ."

The Bankruptcy Act itself, therefore, clearly excludes the petitioners from the position of creditors, because their claims are expressly based upon certificates of preferred stock (R. 34, 42, 44). It was so held in the prior appeal of these same parties: 30 F. Supp. at 107.

While there appear to be no other rulings than the former one in this same matter which construed the language of the Bankruptcy Act as amended by the Chandler Act in 1938, there are cases construing substantially the same definitions in the former § 77B, which was superseded by the Chandler Act—all of which cases are in accord with the decision below: *In re Piccadilly Realty Co.,* 78 F. (2d) 257, 261 (C. C. A. 7, 1935); *Bryan v. Welch,* 74 F. (2d) 964, 971 (C. C. A. 10, 1935); *In re Arcadia Furniture Co.,* 12 F. Supp. 477, 478 (1935). In the *Piccadilly Realty Co.* case, *supra,* the court concluded as follows (p. 261):

> "* * * * therefore matured corporate promises to retire or pay corporate stock cannot be considered corporate debts in a proceeding under 77B."

III.

Pennsylvania Law.

The Pennsylvania law is firmly established to be that preferred stockholders of a corporation occupy a subordinate position to that of creditors and cannot legally receive any part of the corporate assets on account of the par value of their stock or undeclared dividends unless and until corporate creditors are paid in full.

Section 705 of the Pennsylvania Business Corporation Law of 1933, P. L. 364, 15 P. S. § 2852-705, provides in part as follows:

> "No redemption of shares shall be made which will reduce the remaining assets of the corporation below an amount sufficient to pay all debts and known liabilities of the corporation as they mature, except such debts and liabilities as have been otherwise adequately provided for, . . ."

Section 302 of said Pennsylvania Business Corporation Law defines the general powers of business corporations, the seventh of them being as follows, 15 P. S. § 2852-302 (7):

> "To purchase, take, receive, or otherwise acquire, hold on pledge, transfer, or otherwise dispose of its own shares, except that no such purchase or acquisition shall be made at a time when the net assets of the corporation are less than its stated capital, or which would reduce its net assets below its stated capital."

Warren v. Queen & Co., 240 Pa. 154, 87 A. 595 (1913), is probably the leading Pennsylvania case on

the relative rights of creditors and preferred stockholders. That was an action of assumpsit by a preferred stockholder against his company to recover the par value of his preferred stock, based upon a stipulation printed on his certificate that "The shares represented by this certificate shall be redeemed by the Company on March 1, 1911, at par." The corporation filed an affidavit of defense alleging that it did not have the funds or property to redeem the preferred stock and also pay its current expenses and creditors. The plaintiff moved for judgment for want of a sufficient affidavit of defense (in effect demurred to the affidavit of defense). The affidavit of defense was held to state a valid defense. After holding that the Pennsylvania corporation statutes then in effect, which did not differ in this respect from the Pennsylvania Business Corporation Law now in effect, subordinated stockholders to creditors, the Supreme Court of Pennsylvania continued as follows (pp. 160-161):

> "Aside from the Act of 1873, it would be against public policy to permit a preferred stockholder to assert his claim as such against the funds of a corporation in preference to the claims of creditors. The stock of a corporation is its capital, and is responsive to the claims of its creditors. It is held in trust for the payment of the indebtedness of the corporation. The relation of a stockholder and a creditor to a corporation is not at all alike, but entirely different. A certificate of stock does not make the holder a creditor as well as a stockholder. A stockholder cannot be both a creditor and a debtor by virtue of his ownership of stock: Warren v. King, 108 U. S. 389, 399. The stock is part of the capital of the corporation which the holder cannot withdraw until its indebtedness is paid. The preferred stockholder is but a stockholder with a right

to have his dividend paid before dividends on the common stock are paid, and he is not entitled to any dividend until the corporation has funds which are properly applicable to the payment of dividends: 1 Cook on Corp., Sec. 271. He has the right to the dividends on his shares to the extent authorized by his certificate in preference to the holder of common stock, but beyond this he has no right superior to the holder of common stock, and both hold their stock subject to the payment of the indebtedness of the corporation. This is the settled rule recognized in all jurisdictions. A corporation has no right to make any rules by which the holder of stock, common or preferred, may be preferred in the liquidation of its assets over the creditors of the company. In speaking of the rights of the holders of preferred stock, LURTON, J., in Hamlin v. Toledo, Etc., R. R. Co., 78 Fed. Repr. 664, 671, says: 'If the purpose in providing for these peculiar shares (of preferred stock) was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby.' A contract that dividends shall be paid on preferred stock whether any profits are made or not is contrary to public policy and void: Pittsburgh & Connellsville R. R. Co. v. Allegheny County, 63 Pa. 126; Pittsburgh & Steubenville R. R. Co. v. Allegheny County, 79 Pa. 210. An agreement to pay dividends absolutely and at all events—from the profits when there are any, and from the capital stock when there are not—is an undertaking which is contrary to law and is void: 1 Cook on Corp., Sec. 271. Public policy, it is said, condemns with

emphasis any such undertaking on the part of a corporation as to its preferred or guaranteed stock.

We are of opinion that the instrument in suit is a certificate of stock and not an instrument in writing for the payment of money, and that the plaintiff as the holder of such certificate cannot recover the principal of the stock until the indebtedness of the corporation is liquidated."

Other Pennsylvania cases in accord with the proposition that a person cannot, by virtue of any corporate undertaking to secure or redeem his stock, enjoy the advantages of an owner of the business in prosperous times and shift to the position of creditor when the corporation is in the throes of financial embarrassment are *Culver v. Reno Real Estate Co.*, 91 Pa. 367, 375; *Moy v. Colonial Finance Corp.*, 283 Pa. 323, 326, 129 A. 115; and *Mitchell, Receiver of Liberty Clay Products Co.*, 291 Pa. 282, 290, 139 A. 853.

The Pennsylvania cases cited by the claimants are not in point. In *Wolf v. Excelsior Scale & Supply Co.*, 270 Pa. 547, 113 A. 569, it expressly appears that the corporation had no creditors (see 270 Pa. at 550). *Smith v. Citizens Ins. & Mtg. Co.*, 284 Pa. 380, 131 A. 191, was a suit to rescind a stock subscription which had been improperly obtained, and in no way involved creditors. *Peoples-Pittsburgh Trust Co. v. Pittsburgh United Corp.*, 338 Pa. 328, 12 A. (2d) 430, turned upon an agreement, known as the Schiller agreement, wholly independent of the preferred stock certificates and when the Schiller agreement became effective "the certificates", as the court said (p. 335), "dropped out of the transaction." The court in that case said with reference to *Warren v. Queen & Co., supra* (p. 335), "There is no doubt of the validity of that decision", thereby demonstrating that

Warren v. Queen & Co. still is good law in Pennsylvania, where, as in the case at bar, the claimant is relying upon a preferred stock certificate for his status of a creditor.

IV.

Federal Law.

The federal law is also well established to be that a holder of preferred stock is not a creditor and that neither his capital nor undeclared dividends thereon can legally be collected by him until all corporate creditors have been paid in full. *Warren v. King,* 108 U. S. 389 (1883), is probably the leading case in the whole country on the subject at hand. This Court in that case said (p. 396):

> "The rights of the holders of preferred stock in this case must be determined by the language of the stock certificate. . . . But it is stock, and part of the capital stock, with the characteristics of capital stock. One of such characteristics is, that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid."

Other federal cases in accord are *Hamlin v. Toledo, etc., R. R. Co.,* 78 Fed. 664, 670-671 (C. C. A. 6); *Guaranty Trust Co. v. Galveston City R. Co.,* 107 Fed. 311, 318 (C. C. A. 5); *Spencer v. Smith,* 201 Fed. 647, 652 (C. C. A. 8); *Hazel Atlas Glass Co. v. Van Dyk & Reeves, Inc.,* 8 F. (2d) 716, 719 (C. C. A. 2); *In re Hicks-Fuller Co.,* 9 F. (2d) 492, 493-494 (C. C. A. 8); *Curtis v. Dade County Security Co.,* 30 F. (2d) 325, 326 (C. C. A. 5); *Vanden Bosch v. Michigan Trust Co.,* 35 F. (2d) 643, 645 (C. C. A. 6); *Mathews v. Bradford,* 70 F. (2d) 77,

78-79 (C. C. A. 6); and *In re Phoenix Hotel Co.*, 83 F. (2d) 724, 726 (C. C. A. 6).

In the last of those cases the law is well summarized as follows (83 F. (2d) at 726):

> "It is a fundamental rule of corporation law that one cannot be at the same time both a stockholder and a creditor of a corporation in respect to the same funds hazarded in the corporate enterprise. The two relations are antipodal. This principle is not only rooted in sound public policy, but grows out of the very nature of corporations. The assets represented by corporate stock are the basis of its credit, and provide a fund for the payment of its debts. No part of them may be withdrawn for the purpose of retiring shares until debts are paid."

In conclusion, it is respectfully submitted that the instruments on which the claims are expressly founded clearly show that the petitioners are not creditors but only preferred stockholders of the Debtor, and that as such the petitioners are not entitled to prove claims as creditors for the par value of their stock plus the accumulated dividends thereon or any part thereof. If the claims are rejected in *toto*, as seems so clearly right, there is no need to consider whether any part of the claims is entitled to a preference because of any hypothetical sinking fund. The claims recite that the claimants' stock was purchased "through open market transactions" (R. 34, 44). If judicial notice can be taken of the quotations of the New York Stock Exchange, it will be seen that the Debtor's preferred stock in the boom year 1929 sold at a high of $34\frac{3}{8}$ and that its high between January 1, 1930 and December 2, 1938, when it was delisted, was $15\frac{7}{8}$. While it does not appear

when the petitioners purchased their stock, it would appear probable that the allowance of their claims would be an anomalous windfall. The opinions of the learned Referee and of the Courts below are correct and should be sustained. Accordingly, the writ of *certiorari* should be denied.

Respectfully submitted,

WILLIAM H. ECKERT,
Attorney for The Union Trust Company of Pittsburgh, Successor Trustee for Bondholders of the Debtor.